statements, because his client's sentence was to be appealed and, in fact, had both been appealed and then remanded to the same judge. Pet. App. 18a-19a. The "barbarian" comment, it said, "definitely indicates a lack of those characteristics relevant to the practice of law and was directly related and connected to the judicial proceeding." Pet. App. 19a. It showed that he was unfit "to discharge continuing obligations to clients or the courts which the [United States] Supreme Court holds as synonymous to conduct that is prejudicial to the administration of justice." *Id.* As to the First Amendment issue, it said the issue was not whether the judge's reputation had been harmed, but whether the criticism "adversely affects the administration of justice and adversely reflects on the attorney's judgment, and, consequently, [his] ability to practice law." Pet. App. 21a-22a, quoting *In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1990). Mr. Lumumba's misconduct, it said, satisfied this standard.

The court also said:

> Lumumba's duty was to his client, not to his own need to test the trial judge in a verbal battle over whether or not the trial court had been fair, and whether the trial court needed instruction in how best to get along with lawyers among other inappropriate comments. Under the guise of "protecting the record," Lumumba abandoned his client to pursue his own interest.

Pet. App. 26a. It then concluded:

> The public is entitled to know that when lawyers engage in such conduct, their clients are not well served.

Pet. App. 27a. Finally, it concluded that it knew "of no other case decided by this court where an attorney has addressed a trial court in the manner as disrespectful and insulting as here." Pet. App. 28a.

The two dissenting justices would have held that the proceeding was not ongoing when Mr. Lumumba made his remarks. Pet. App. 35a, 43a (disagreement is with majority's "determination of facts"). But it was nevertheless conceded that Mr. Lumumba's remarks were "irresponsible and unbefitting a member of the Bar," Pet. App. 34a, and that his comments were "wrong and completely inappropriate," Pet. App. 39a, and his conduct "on the record fell short of these [Rule 3.5] honorable standards", Pet. App. 42a.

REASONS WHY THE WRIT SHOULD BE DENIED

A. There is no conflict among the courts concerning the legal standard to be applied in Rule 8.4(d) cases.

The Petition fails to identify a conflict worthy of certiorari review. It simply claims that this lone state supreme court decision is wrong because it applied the accepted law in a manner that allegedly conflicts with decisions of a few other courts. It does not identify any point at which the decision misstated the law. As Sup. Ct. R. 10 cautions: a writ is rarely granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Nor does it identify any widespread disagreement about what the law is.

Moreover, there is no conflict. If anything, the cited decisions support the state court decision.

Cases on which petitioner relied.

In the state Supreme Court, the petitioner relied on two of the five cases now said to be in conflict with that court's decision. *See* Appellee-Cross-Appellants Brief at 15-17; Appellee/Cross-Appellants Reply Brief at 3-5. They are as follows:

Ramsey v. Board of Professional Responsibility, 771 S.W.2d 116 (Tenn. 1989). The Tennessee Supreme Court affirmed disciplinary sanctions against an elected district attorney for contemptuous conduct, but refused to sanction him for remarks he had made not related to an on-going case, i.e., that a judge was "mucking up" his cases. After discussing the attorney's right of free speech, it said a lawyer had a right to criticize a judge:

> after a case is concluded so long as the criticisms are made in good faith with no intent or design to willfully or maliciously misrepresent those persons and institutions or to bring them into disrepute.

Id. at 121. Because the remarks were made after the cases in question were concluded and it found no willful intent to bring the judge into disrepute, the court refused to sanction the attorney.

Here, the remarks were made in the midst of an on-going case, and were about that case. In separate decisions, the state appellate courts have found that his statements were unwarranted, were intended to bully the judge, and were intended to interfere with the administration of justice.

Standing Committee v. Yagman, 55 F.3d 1430 (9th Cir. 1995). The Ninth Circuit set aside federal court discipline of an attorney who had accused a judge of anti-Semitism. It commented, however, that an accusation of dishonesty would be sanctionable, *id.* at 441, and that the standard for assessing a lawyer's conduct was an objective standard pursuant to which the court must determine what "a reasonable attorney, considered in the light of all of his professional functions, would do in the same or similar circumstances." *Id.* at 437, quoting, *United States District Court v. Sandlin*, 12 F.3d 961 (9th Cir. 1993).

It found that the attorney, even if he was attempting to force the judge to recuse himself, had not engaged in conduct prejudicial to the administration of justice both because a party cannot legally force a judge to recuse himself and because the judge in question was a federal judge with life tenure. *Id.* at 1443-4.

In this case Mr. Lumumba accused the elected state circuit judge of dishonesty and lawlessness. The state Supreme Court applied the *Sandlin* objective standard and found his actions objectively unreasonable. Pet. App. 22a. Also, in this case, the danger to the administration of justice presented by his intimidation tactics is readily apparent. Mr. Lumumba had previously used similar tactics to obtain the unwarranted recusal of two other circuit court judges.

Other cases cited here.

Nor do the other cases the Petition says conflict with this one help the petitioner:

Idaho State Bar v. Topp, 925 P.2d 1113 (Idaho 1996). The Idaho Supreme Court upheld a public reprimand of an attorney who publicly accused a judge of making a decision for political reasons. The court noted that the statement by the attorney insinuated the attorney was privy to some facts unavailable to the public. *Id.* at 1115. It, too, relied on the *Sandlin* objective standard. *Id.* at 1116. Because the attorney had no proof that the judge's decision was politically motivated, the Court concluded that "a reasonable attorney, in considering these facts, would not have made the statement in question." The statement impuned the judge's integrity, and so established a violation.

Topp supports the state Supreme Court's action in this case. Mr. Lumumba has made no attempt to prove that the judge in fact lacked legal learning, or was violent, or refused to follow the law, which are the definitions of barbaric conduct.

State ex rel. Oklahoma Bar Association v. Porter, 766 P. 2d 958 (Okla. 1988). The court said an attorney could not be disciplined for saying a judge was racist when the attorney explained why he believed that was true. It also said, however, that it would be impermissible for an attorney to say that a judge was a crook or was in a conspiracy to rob him. *Id.* at 962.

The court also squarely rejected the notion that out-of-court statements were different from in-court statements. It quoted *In re Sawyer*, 360 U.S. 622, 635 (1959) as saying "the verbalization is that it is impermissible to litigate by day and castigate by night." *Id.* at 965. *See also Sawyer*, 360 U.S. at 636 (lawyer statements "are equally serious whether he is currently engaged in litigation before the judge or not.").

In this case, Mr. Lumumba had no basis whatsoever for his claim that he had bought justice in other courts or that the circuit judge was a lawless barbarian.

In re Erdmann, 33 N.Y. 2d 559, 301 N.E. 2d 426 (N.Y. 1973). The New York Court of Appeals set aside discipline against a lawyer who, with reference to the legal system as a whole commented to a publication that appellate judges were "whores who became madams." Avoiding the constitutional issue, the Court said that comments made "outside the precincts of the court are not subject to professional discipline" under state law. *Id.* at 427.

In this case, Mr. Lumumba's comments were about a specific judge and a specific proceeding. Also, New York law now allows a lawyer to be disciplined for remarks made outside the courtroom. *In re Holtzman*, 78 N.Y. 2d 184, 577 N.E. 2d 30 (N.Y. 1991) (discipline for public letter "prejudicial to the administration of justice" which "adversely reflects on [the attorney's] fitness to practice law. . . .").

None of these decisions stands in the way of disciplining an attorney who, during a pending case, accuses a judge of being a "barbarian," i.e., a stupid, violent person who does not follow the law, especially when the attorney fails to even argue that any of those things are true.

Points B and C.

In particular, with respect to Petition "Law and Argument" points B and C:

* Point B appears to argue that a different standard is applied to remarks made outside the courtroom after a case is over. *See, e.g., Yagman, supra*, 55 F.3d at 1438

(must show clear and convincing evidence of prejudice when remark is made after the case is over). But the state Supreme Court here found the case was not over, particularly where Mr. Lumumba's client, in fact, had to appear before the same judge for resentencing. That makes perfect sense from the client's point of view.

* Point C alleges that Mr. Lumumba could not be disciplined because his characterization of the judge as a "barbarian" could not be proven true or false, and was mere opinion.

The lower court did not reach this point, because the interest it sought to protect was not the reputation of the judge, but the interest of the client who had to appear before that judge. That is why the courts have adopted the *Sandlin* "reasonable attorney" standard for determining whether attorney speech in a pending case prejudices the administration of justice. It is analogous to Fed. R. Civ. P. 11 which penalizes frivolous arguments. An attorney's job is to represent his client, not himself.

In addition, calling a judge a "barbarian" is bad advocacy. In fact, it is advocacy in reverse. Persuasion, as Aristotle said, depends not only on logic but on the reputation and bearing of the speaker and the emotions of the audience. Such a comment would make even the sternest judge think less of the attorney who made such a remark, and could provoke the judge to reject the attorney's arguments, if the law allowed room for that, as it frequently does. *See* B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1937).

Moreover, whatever a "barbarian" is, a "barbarian" is not a qualified judge who acts with integrity, as all judges swear to do. Such an accusation is a demonstrably false statement of fact when made with respect to a decision of

a court in which the judge displayed learning, a proper judicial demeanor, and adherence to the law.

B. In addition, there are prudential reasons not to grant the writ.

Same result.

Petitioner has not challenged two of the three grounds on which he was disciplined. Also, with respect to his interference with the administration of justice, i.e., violation of Rule 8.4(d), he does not dispute that his courtroom conduct was a violation. All he challenges is the part of the finding that concerned his "barbarian" statement. As a result, it is unlikely that, even if he succeeded here, the result would be any different on remand, although that is possible.

Contrary finding unchallenged.

In addition, one of the grounds he does not challenge directly contradicts his claim that his statement was opinion, not fact. The Rule 8.2(a) holding rested on a finding that he had made a knowingly false statement about the qualifications or integrity of a judge. Pet. App. 23a. That finding under Rule 8.2(a) is now final, and not subject to review. It is also correct, in part because the comment was intended to summarize the false allegations previously made in court.

Misstatement of constitutional rule.

Furthermore, this Court has held that the common law protection of opinion is not required by the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1,

18-19 (1990). Mr. Lumumba's statement was in no way "political hyperbole." It was not made in an election context.

Prior adjudication.

In this matter, Mr. Lumumba was found by the state appellate court in the 2003 contempt decision to have acted in a contemptuous manner "designed to impede the administration of justice." *See* p. 5, *supra*. That ruling is final and was not brought to this court. It would be odd for this Court to grant certiorari and, in effect, collaterally attack that prior ruling.

Even if there were a conflict on an important legal question, which there is not, this would not be an appropriate case to choose to decide that question.

CONCLUSION

The power of a court depends on the integrity of its judges. The ability of a court to make peace in society depends not only on the respect the court shows for the litigants, but also on the respect the litigants have for the court. When a lawyer, whom the public presumes has special knowledge, makes public statements that a court is demanding money before it will give justice, and that a judge is ignorant, lawless, and violent, the public is prone to believe that the statements have a factual basis. That diminishes respect for the court system, disserves the client, and interferes with the administration of justice. The state Supreme Court properly sanctioned Mr. Lumumba.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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